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No. 97-570

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO RESPONSE OF THE STATE OF UTAH

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PETITIONERS' REPLY TO RESPONSE OF THE STATE OF UTAH

Pursuant to the direction of the Court by letter dated November 24, 1997, the Office of the Clerk requested that the State of Utah file a response to the petition for a writ of certiorari in this case (although aligned with the Counties below, the State had previously waived the right to respond). On December 23, 1997, the State filed a "RESPONSE OF THE STATE OF UTAH TO REQUEST FOR STATEMENT OF POSITION." Petitioners' Reply to the Response of the State of Utah is submitted pursuant to Sup. Ct. R. 15.6.

INTRODUCTION

A. The Response of the State of Utah Confirms the State's Disagreement With the Decision of the Tenth Circuit Court of Appeals.

As a preliminary matter, it should first be noted that in its response, the State of Utah does not back away, in any respect, from the diminishment/disestablishment arguments the State submitted in the district court and in the court of appeals:

> The State's decision was *not* made because it was satisfied that the Tenth Circuit decision had *satisfactorily* or *correctly* resolved the matter. . . . The State has *not* changed its position concerning the merits of the boundary litigation. . . This decision does *not* represent agreement with the decision of the Tenth Circuit that is the subject of the pending Petition.

Resp. of the State of Utah to Req. for Statement of Position at 2, 3, 4, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe*, (No. 97-570) (emphasis added) (hereinafter Resp. of Utah).

In other words, the State of Utah continues to recognize the unworkable and unprecedented nature of the decision of the Tenth Circuit Court of Appeals, that it is in direct conflict with the decision of this Court in *Hagen v. Utah*, 510 U.S. 399 (1994), and that *Hagen* did not

hold, as the court of appeals erroneously concluded, that historic reservation boundaries still exist in spite of the "restoration to the public domain" language of the Uintah Acts, so as to encompass tens of thousands of acres of fee lands that are not owned or populated by members of the Ute Indian tribe. In this respect, to the extent that the Counties have consistently relied upon the same analysis and authorities as the State of Utah, the response undeniably *substantiates* the arguments set forth in the petition—in spite of taking "no position" on the petition because of other competing interests.[1]

For this reason, and to further insure that the arguments of the State of Utah receive consideration in the context in which they were originally submitted, the Counties, for the convenience of the Court, have appended in their entirety the motions and briefs that the State of Utah submitted in the court of appeals. Reply to Resp. App. 1a-88a. The documents make perfectly clear the "position" of the State referred to in the response, which has "not changed." Resp. of Utah at 3. The arguments support the historic reservation boundary disestablishment recognized in *Hagen*. On the merits, these arguments also support the Counties' petition in *every* respect. The significant aspects of the State's arguments are cited in Argument I *infra*, and briefly discussed in Argument II, *infra*.

B. The Response of the State of Utah Specifically Confirms That Future Negotiations Were Not Intended to Affect the Compelling Reasons for Granting the Petition for a Writ of Certiorari in this Case.

The fact that the State has agreed to a "road map for future negotiations" does not detract from any of the reasons previously submitted in support of the petition for a writ of certiorari in this case. *Id.* at 4. Nor was it

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[1] The brief of *amici* States similarly supports this petition. Br. for the States of California, *et al.* as *Amici Curiae* in Supp. of Pet'rs, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe*, (No. 97-570).

intended to do so. As the "road map" itself attests, the opposite is true with reference to this petition and specifically to the decision of the Tenth Circuit Court of Appeals. Resp. of Utah App. at 3a. To allow for this contingency, the "road map" is prefaced by the express disclaimer: "Absent a change in controlling law. . . ." *Id.* This petition can and should lead to that change in controlling law.

In addition, the "road map" also disclaims any intent to "necessarily determine the respective rights of Indians and non-Indians within the areas covered by that decision." *Id.* And finally, the right to "pursue litigation as a last resort" to clarify the "fundamental rights of residents of the area or the respective jurisdiction of the parties" was also explicitly acknowledged. *Id.* As a result, even if the Counties had been a part of this process (and they were not, as the State appropriately points out) nothing in the process adopted by the State of Utah undermines the need for the relief requested in this petition. Resp. of Utah at 3-4.

Moreover, as a practical matter, the State's response *affirmatively* establishes the need for this Court to exercise its discretionary jurisdiction in this case. It does so by confirming in no uncertain terms the "jurisdictional chaos" that will result if the Tenth Circuit's decision is allowed to stand:

> The *Tribe* and the *Counties* have *aptly* described the present situation as one of "*jurisdictional chaos*," characterized by *many* categories of land ownership and a wide variety of unanswered jurisdictional questions. For example, just to determine jurisdiction in an arrest for criminal activity, both a *survey* to determine the exact location of the crime *and* a *title search* to establish the *past* and *present* ownership of the land are often necessary.

Id. at 3 (emphasis added).

As all parties acknowledge, the scope of this problem is truly "monumental." Tr. of Ct. Proceedings at 10, *Ute Indian Tribe v. Utah*, (Oct. 21, 1997) (No. 75-CV-408-J); Reply App. at 3a. In light of the hundreds of thousands of acres involved in this "jurisdictional chaos" area, appropriate relief from this Court is clearly warranted.[2]

In the final analysis, there is not even a suggestion here that the State's approach can realistically resolve any of the substantial questions in this area in the foreseeable future. It is for this reason that the Counties have sought and relied upon the proper application of the rule of law in this case—a rule of law that has been applied in all similar diminishment/disestablishment areas in the past, *without* exception and *without* substantial complications. The Tenth Circuit should have implemented this rule of law. *See* discussion of *Hagen* in Pet. at 20-22 (No. 97-570). *See also DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 (1977) and all related decisions premised on a similar "*pro tanto*" disestablishment of historic reservation boundaries around areas directly affected by similar legislation.

Moreover, the Counties can certainly understand the "desires" of the Ute Indian tribe in seeking by negotiation a recognition of special exemptions and other special treatment throughout the entire area for all tribal members, treatment reserved to tribal members within Indian reservations. Resp. of Utah App. 4a-5a. However, the Counties cannot understand how the State of Utah or Congress could constitutionally confer that special recog-

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[2] The federally funded and tribally assisted tract by tract *title* opinions and corresponding *mapping* processes, involve "28" different land categories and hundreds of thousands of acres of land. No one can accurately predict when such a project will be complete. *See also* the related argument set forth in the brief of *amici* States, Br. for the States of California, *et al.* in Supp. of Pet'rs at 12-15, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570).

nition on Ute tribal members in areas that this Court has held are no longer part of the Uintah reservation, as even the Tenth Circuit has recognized. For this reason, in part, the Counties have not participated in this aspect of the "road map" process.[3]

Of course, this is not to say that the process itself is not appropriate and certainly commendable to resolve many of the other conflicts that confront the Ute Indian tribe, the State of Utah and the Counties in the area in question. In those instances, the Counties have always welcomed the opportunity to resolve differences in this fashion.

ARGUMENT

I. THE SPECIFIC ARGUMENTS SUBMITTED BY THE STATE OF UTAH IN THE TENTH CIRCUIT UNEQUIVOCALLY SUPPORT THE HISTORIC RESERVATION BOUNDARY DISESTABLISHMENT RECOGNIZED IN *HAGEN*.

The State of Utah has consistently supported the historic reservation boundary disestablishment recognized in *Hagen*. For this reason, as noted *supra*, the Counties have appended the briefs and motions submitted by the State of Utah in the Tenth Circuit in their entirety. Reply to Resp. App. 1a-88a. A few references to these documents demonstrate the extent of that support. For example, see Br. of Appellant State of Utah, at 8 (App. 19a), 12 (App. 23a), 26 (App. 38a), 30 (App. 42a-43a), 31 (App. 43a), 34 (App. 47a), 40 (App. 53a), 43 (App. 56a), 44 (App. 57a), 49 (App. 62a), *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (No. 96-4073). *See also* Reply Br. of Appellant State of Utah at 10 (App. 78a), 11 (App. 79a), 12 (App. 80a), 13 (App. 81a), 17 (App. 85a), *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (No. 96-4073).

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[3] On December 10, 1997, similar questions regarding the scope of the plenary power of Congress in this respect were briefly raised during oral argument. Tr. of Oral Argument at 10, 19-21, 39-40, 55, *Alaska v. Native Village of Venetie*, (No. 96-1577).

II. THE COUNTIES RECOGNIZE THAT THE SCOPE OF DIMINISHMENT/DISESTABLISHMENT SET FORTH IN THE CASE LAW IS AT TIMES UNCLEAR AND CONFUSING; NEVERTHELESS, THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS DIRECTLY CONFLICTS WITH *HAGEN* AND CONFLICTS IN PRINCIPLE WITH ALL RELATED RESERVATION DIMINISHMENT/DISESTABLISHMENT PRECEDENT.

In the references noted *supra*, the State of Utah did not always use the terms "diminished/disestablished" as words of art. But that is also true of the other parties and the courts that have been involved in this and all other similar litigation. The Tenth Circuit failed to recognize this fact and the fundamental error of that court centers around a misconstruction of the diminishment/disestablishment holding in *Hagen*.

Ignoring that prior precedent from this Court has always recognized that all types of diminishment/disestablishment statutes extinguish historic reservation boundaries, the court of appeals found that the *Hagen* opinion did not support that conclusion. Emphasizing an alleged difference between "diminished" and "disestablished" in the text of the *Hagen* opinion, and focusing on an alleged limitation in the public domain description in the *Hagen* opinion that only referenced lands directly affected ("with respect to those lands"), the court of appeals misconstrued *Hagen*. *Hagen*, 510 U.S. at 414. *Hagen* did *not* hold that the boundaries of the historic Uintah Reservation were somehow also *modified* to *exclude* only those lands actually restored to the public domain and, at the same time, *modified* to *include* all other lands, as the court of appeals has decided.

The fact that such a holding would have been completely unprecedented and in conflict with the decisions cited and relied on as precedent in *Hagen*, was not given due consideration and received no mention in the court of appeals' opinion. The State of Utah had stressed this

point. Reply to Resp. App. 43a. The holdings in *DeCoteau* (disestablished) and *Rosebud* (diminished) attest that in *both* instances the historic boundaries around the areas affected were *necessarily disestablished*. In addition, as the State of Utah also noted, any contrary holding in this case would not only have to ignore that precedent, but it would also have to ignore the understanding of that precedent evidenced by the specific submissions of the parties in *Hagen*: namely, that federal and tribal jurisdiction would be limited to *trust* land in the event that diminishment/disestablishment was found. *Id.* at 23a.

Moreover, the holding of the Tenth Circuit could not possibly be correct even if one were to assume *arguendo* that *Hagen* only decided the non-reservation status of the lands specifically restored to the public domain (and not the status of the lands that remained). Precedent (*DeCoteau* and *Rosebud*) establishes that non-reservation status of the restored lands in all instances is *necessarily* tied to the disestablishment of historic reservation boundaries and *Hagen* relied on that precedent. Even if *Hagen* was not intended to also resolve the status of the other lands that remained, it certainly cannot be maintained that *Hagen* intended *diminishment* in the *unprecedented* format adopted by the court of appeals. Nevertheless, this is what the court of appeals has erroneously decided that *Hagen held*. The State of Utah strongly disagreed with this view of *Hagen*. *Id.* at 42a-45a.

The operative language of Uintah legislation restored all unallotted lands to the public domain and thereby extinguished historic reservation boundaries. *Id.* at 43a. In such a situation, the allotted lands in the area ordinarily would no longer be within the limits of an Indian reservation (18 U.S.C. 1151(a)), contrary to what the court of appeals has held (based on an incorrect view of the *holding* in *Hagen* purportedly directed to the status of these "other" lands). Rather, Congress intended that 18 U.S.C. 1151(c) apply in that instance. See *United States*

v. Pelican, 232 U.S. 442 (1914) and the revisor's notes to 18 U.S.C. 1151(c). Nothing in *Hagen* even suggests that this analysis was *not* applicable in the context of the Uintah legislation. And the mere fact that Congress provided for a Uintah "grazing" reserve at the same time (not a "diminished reservation") could not affect the "reservation" status of the allotments in any event. Reply to Resp. App. 56a.

While there might have been some general questions when this Court had an opportunity to address the consequences of similar diminishment/disestablishment legislation in oral argument in *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) there was no misunderstanding on this point. Although it was noted that the dissent in *Yankton* in the court of appeals even said that the reservation in question was only "diminished," the parties made clear (and so did the United States) that the issue in *Yankton* was really one of reservation disestablishment. Tr. at 4-6, 23, 25, 27, 32, 33, 34, 39-41, 49-50, *Yankton Sioux Tribe* (No. 96-1581).[4] In *Hagen*, the parties submitted the case with that same understanding, as the State of Utah pointed out. Reply to Resp. App. 56a.

In *Yankton*, as in this case, the scope of the cession (or the restoration) was not restricted so as to exclude a discrete area of the original reservation that Congress intended to maintain as a "diminished" reservation. As a result, *DeCoteau* establishes that the entire historic reservation boundary was disestablished.[5]

The maps submitted in both *Hagen* and *DeCoteau confirm* this understanding and analysis. In *Hagen*, the State of Utah submitted a reference map. As *amici* States point

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[4] Nevertheless, diminished and disestablished were sometimes used interchangeably even in this argument. Tr. at 49-50, *Yankton Sioux Tribe* (No. 96-1581).

[5] *Rosebud* confirms that holding insofar as it relates to historic boundaries around areas other than the "diminished" reservation.

out, the map, coded to trust land, makes sense only in this context. Br. for States of California, *et al.* at 10, n. 4 (No. 97-570). *See also* Pet. at 18 (No. 97-570). In *DeCoteau*, the United States prepared and appended a special diagram from a more detailed Bureau of Indian Affairs map that illustrated the same point. Br. U.S. at 7 n. 2, *DeCoteau* (No. 73-1148). As the United States explained in oral argument:

> MR. SACHSE: . . . Indian country is any land inside a reservation. If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent*, and I think it would also undercut 18 U.S.C. 1151 seriously. At least for this reservation.
>
> QUESTION: Yes, but go ahead. If the Court should hold—
>
> MR. SACHSE: If the Court should hold that, then each one of these red spots is a *little island of federal and tribal jurisdiction*, and we're not in a time now when these—
>
> QUESTION: That's the way it's been, isn't it, as my brother White suggested?

Tr. at 21, *Erickson v. United States ex rel. Feather*, 420 U.S. 425 (1975) (No. 73-1500) (emphasis added).

In Utah that is the way it had been until the Tenth Circuit altered the status quo. *Hagen*, 510 U.S. at 414-415. And that is the way the United States told this Court it would be again, if the Utah Supreme Court was affirmed in *Hagen*. *Hagen* affirmed the Utah Supreme Court, but the decision of the Tenth Circuit does not reflect that holding.[6]

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[6] One additional point is noteworthy in this regard. The United States District Court in Utah has continued to enjoin the Counties from implementing the *Hagen* mandate. Reply Br. of Pet'rs at 1-3 (No. 97-570).

CONCLUSION

In the Petition, the Counties requested that the Petition for a Writ of Certiorari be granted and for the Court to fashion some type of appropriate relief. Alternatively, we suggested that consideration of the Petition be deferred until after this Court had an opportunity to view the issue in light of the briefing and oral argument in *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) (Monday, December 8, 1997). Because the United States elected not to express its views to this Court regarding the Tenth Circuit's construction of *Hagen*, we further suggested in our Reply Brief that the United States be invited to do so. Now that the State of Utah has clarified its role in this litigation, we respectfully submit that the United States, at the very least, should explain how it could tell this Court one thing in *Hagen* and then tell the court below a different story.

Respectfully submitted,

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